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No. 99-1178

IN THE

Supreme Court of the United States

SOLID WASTE AGENCY OF NORTHERN COOK COUNTY,

Petitioner,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *ET AL.*,

Respondents.

On Writ of *Certiorari* to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the U.S. Army Corps of Engineers, consistent with the Clean Water Act and the Commerce Clause of the United States Constitution, may assert jurisdiction over isolated, intrastate waters solely because those waters serve, or potentially could serve, as habitat for migratory birds.

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Virginia S. Albrecht & Bernard N. Goode,
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Thomas E. Dahl, *Wetlands Losses in the United States 1780's to 1980's*,
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Ralph E. Heimlich, *et al.*, *Wetlands and Agriculture: Private Interests and Public Benefits*,
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Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* (Ass'n of State Wetland Managers, 1994) 10, 11

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Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary, 104th Cong. (1996) (statement of Robert McMackin) 6

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of business organizations and individuals. The Chamber represents an underlying membership of nearly three million businesses and business organizations, with 140,000 direct members of every size, in every business sector, and from every geographic region of the country. As the nation's preeminent business association, the Chamber has an obvious interest in the scope of federal regulatory authority in general, and federal environmental regulation in particular.

In addition, the Chamber has extensive interests in federalism issues. The Chamber participates regularly as *amicus curiae* in this Court's federalism cases, *see, e.g., United States v. Locke*, 120 S. Ct. 1135 (2000); *Geier v. American Honda Motor Co.*, 120 S. Ct. 1913 (2000); *Crosby v. National Foreign Trade Council*, 120 S. Ct. 2288 (2000), often in order to urge the Court to preserve intact the unfettered national and international markets envisioned by the Framers. At the same time, the Chamber has launched its Federalism Initiative, a collaborative effort of non-profit trade groups, corporations, and federal, state, and local officials, that seeks to bring into better focus a vision of the respective state and federal roles in our federalist system. The Chamber recognizes that where local authority is the best means to a careful, sensitive consideration of local needs, federal intervention may be counterproductive—a prescription for overlapping regulatory regimes, duplicative administrative requirements, and uncertainty for the regulated community.

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of the brief. Counsel of record for the parties have given written consent to the filing of this *amicus* brief in letters that have been submitted to the clerk. *See* S. Ct. R. 37.3(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case does not challenge the power of federal agencies to regulate activities that cause the pollution of interstate waterways, their tributaries, or adjacent wetlands. The pollution or filling of wetlands that are connected to navigable waters undoubtedly can have significant impacts on the instrumentalities of interstate commerce (navigable waterways) and interstate commerce itself. Congress accordingly should, and does, have ample authority over these truly interstate and commercial problems.

The case instead presents the question whether the federal government may set land-use policy for 17.6 acres of hydrologically isolated wetlands, whose only connection with interstate commerce is the fact that they are actual *or potential* landing zones for migrating birds. Under the "migratory bird interpretation" of the U.S. Army Corps of Engineers ("Corps"), the answer to that question is an emphatic *yes* that puts the federal government in the leading role in land-use decisionmaking for, not just this isolated plot, but every "damp depression" in the nation. The migratory bird interpretation threatens to impose Army jurisdiction over every backyard in the United States.

This case is therefore "about federalism." *Coleman v. Thompson*, 501 U.S. 722, 726 (1991). Along with separation of powers, federalism is one of the two most essential structural elements of our Constitution. Federalism's core function is to preserve individual liberty by creating a "healthy balance of power between the States and the Federal Government," thereby reducing "the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). The Constitution thus divides "authority between federal and state governments for the protection of individuals," *New York v. United States*, 505 U.S. 144, 181 (1992), by establishing a national government that may exercise only a "few and defined" enumerated powers. *Marbury v. Madison*, 5 U.S.

(1 Cranch) 137, 176 (1803) (Marshall, C.J.) (citing *The Federalist* No. 45 (James Madison)). Moreover, even the broadest of those powers—the federal government's power to regulate "commerce" among "the several states"—"has limits," which this Court "has ample power to [enforce]." *Maryland v. Wirtz*, 392 U.S. 183, 196 (1968).

For reasons described below, both the spirit and letter of the Constitution's limits on federal power are exceeded by the migratory bird interpretation. At the outset, this Court has long recognized that land-use planning is situated squarely on the State side of the line of demarcation between federal and State responsibilities. The migratory bird interpretation not only prevents States from fulfilling their role as the laboratories for policy innovation, it does so in a context where both this Court's precedents and the lessons of experience teach that States most often know best. *See* Part I, *infra*.

But even beyond policy implications, the limitless migratory bird interpretation cannot be squared with this Court's Commerce Clause jurisprudence. As is evident from the attenuated chain of reasoning employed by the court below—a chain so thin that it would permit unfettered federal regulation of *all* aspects of local affairs—the Corps' asserted regulatory justification lacks any substantial relation to economic activity of any kind, much less to interstate commerce. The occasional use of a wetland by a migrating bird "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *United States v. Lopez*, 514 U.S. 549, 561 (1995). Moreover, the fact that this intrusive regulation of non-economic activity has unfortunate economic side-effects cannot be used as a bootstrap to salvage the Corps' interpretation from constitutional infirmity. *See* Part II, *infra*.

Finally, although the Corps' interpretation squarely presents a grave constitutional issue, that issue may be avoided through a proper interpretation of the Clean Water Act

("CWA" or "Act"). This Court has cautioned that where Congress intends to intrude upon "the usual constitutional balance of federal and state powers," it should do so by issuing a clear statement. *Gregory*, 501 U.S. at 460. In this case, Congress not only failed to provide such a statement, it expressly stated the opposite—that States should continue to play the "primary" role in regulating land use, planning, and zoning. *See* 33 U.S.C. § 1251(b) (1994). Accordingly, the Corps' migratory bird interpretation may and should be overturned on the statutory grounds argued by the Petitioners. *See* Part III, *infra*.

ARGUMENT

I. THE MIGRATORY BIRD INTERPRETATION INTRUDES UPON AREAS OF TRADITIONAL STATE CONCERN AND THEREBY DISRUPTS THE CONSTITUTION'S FEDERALIST DESIGN.

The Corps' migratory bird interpretation is a deep intrusion into a "usual" and traditional province of State regulation. *Cf. Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). It places literally millions of acres of residential neighborhoods, farmlands, and recreational areas under federal jurisdiction, merely because of the actual or potential presence of migratory birds. *See* Part I.A., *infra*. State initiatives in land use generally, and wetlands protection specifically, are therefore increasingly threatened by federal action taken in the name of wetlands protection. *See* Part I.B., *infra*. This expansive federal displacement of local land-use, planning, and zoning law not only disrupts our system of dual sovereignty, but does so at the expense of States' recognized expertise in what this Court has described as "the quintessential" function of State government. *See* Part I.C., *infra*.

A. The Migratory Bird Interpretation Permits Federal Intrusion into Land-Use Planning for Virtually Every Plot of Land in the Nation.

There are over one hundred million acres of wetlands in the continental United States. *See* Thomas E. Dahl, *Wetlands Losses in the United States 1780's to 1980's*, U.S. Fish & Wildlife Service (1990). Each year, between 100,000 and 200,000 acres of wetlands are lost, but another 100,000 to 200,000 acres of wetlands are created, due to natural processes and human activities. *See* Ralph E. Heimlich, *et al.*, *Wetlands and Agriculture: Private Interests and Public Benefits*, Agricultural Economic Report No. 765, U.S. Dep't of Agriculture 20-23, 53 (1998).

The vast majority of these wetlands—approximately three-fourths—are located on private lands. *See* Jon Kusler, *Wetlands Delineation: An Issue of Science or Politics?*, Environment, Mar. 1992, at 7, 29. A 1995 Corps study reveals that isolated wetlands, those areas that meet the regulatory definition of a "wetlands" yet lack a hydrological connection to navigable waters of the United States, account for a significant portion of wetlands generally. *See* U.S. Army Corps of Engineers, *1995 Wetlands Delineation Field Evaluation Forms* (June 1995). That 41-state study found that over eight million discrete parcels of less than a half-acre in size meet the Corps' wetland definition. *See id.*

Under 33 C.F.R. § 328.3(a) and the "migratory bird interpretation," the Corps regulates all manner of activity on these small and privately owned wetlands without any regard to the potential commercial impacts of those regulated activities. Each year, the Corps approves approximately 85,000 permits for the use or modification of designated wetlands. *See* U.S. Gen. Accounting Office, Report No. GAO/RCED-98-150, *Wetlands Overview: Problems With Acreage Data Persist* 36 (1998). Because nearly any activity that can result in the deposit of "fill" material onto land is covered, the Corps

regulates even the most basic acts by landowners, including "the construction or expansion of a single-family home and attendant features (such as a garage, driveway, storage shed, and/or septic field) for an individual permittee." 64 Fed. Reg. 47,175, 47,178 (Aug. 30, 1999) (providing final notice of modification of permits involving single family housing). Under existing regulations, the Corps has even required permits for residential construction impacting a closet-sized parcel (26 square feet) and a local mosquito control project affecting a recreation-room-sized parcel (400 square feet) of wetlands. *See* Virginia S. Albrecht & Bernard N. Goode, *Wetland Regulation in the Real World* ix (1994).

The Corps regularly brings enforcement actions against landowners large and small for actions such as building vacation homes. *See Regulatory Warning: Hearings Before the Subcomm. on Commercial and Administrative Law of the House Comm. on the Judiciary*, 104th Cong. (1996) (statement of Robert McMackin) (describing the Corps' determination that construction of a vacation home on a third of an acre lot violated federal wetlands regulations). Although purportedly adhering to a *de minimis* exception, the Corps nonetheless asserts authority to regulate "walking, bicycling or driving a vehicle through a wetland," because such activities could result in the "discharge of dredged material." 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993).

This looming regulatory edifice rests on a narrow sliver of federal law—section 404 of the Clean Water Act. *See* 33 U.S.C. § 1344 (1994); *see also* Federal Water Pollution Control Act of 1972, Pub. L. No. 92-500, 86 Stat. 816; 33 U.S.C. § 1251 note. The CWA prohibits only the "discharge of any pollutant" into "*navigable* waters" of the United States without a permit. 33 U.S.C. § 1311(a) (1994) (emphasis added). Section 404 of the CWA in turn authorizes the Corps to issue permits "for the discharge of dredged or fill material," subject to oversight by the Environmental Protection Agency ("EPA").

33 U.S.C. § 1344(a), (c). For purposes of these provisions, "navigable waters" are defined as "the waters of the United States." 33 U.S.C. § 1362(7) (1994).

It is the regulations promulgated by the Corps and EPA—not the statute itself—that expansively defines the "waters" subject to the Corps' regulatory regime. The most crucial of these regulations defines the "waters" over which the Corps asserts authority to include:

> All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of *which could affect interstate or foreign commerce* including any such waters: (i) Which are or *could be used* by interstate or foreign travelers for recreational or other purposes; or (ii) From which fish or shellfish are or *could be taken* and sold in interstate or foreign commerce; or (iii) Which are used or *could be used* for industrial purpose by industries in interstate commerce.

33 C.F.R. § 328.3(a)(3) (emphases added); *see also* 40 C.F.R. § 230.3(s) (identical definition promulgated by the EPA). Moreover, the Corps further extends this already expansive definition to cover "[w]etlands adjacent to waters (other than waters that are themselves wetlands)." 33 C.F.R. § 328.3(a)(7).

Finally, in case there were any doubt that the Corps seeks authority over as much land as possible, the Corps issued its migratory bird interpretation of the "could affect commerce" standard set out in section 328.3(a)(3). Specifically, in a 1986 regulatory preamble, the Corps "clarified that waters of the United States" as defined by the Corps and EPA "also include" those waters "[w]hich are or *would be used* as habitat by birds protected by Migratory Bird Treaties; or . . . [w]hich are or *would be used* as habitat by other migratory birds which cross

state lines." 51 Fed. Reg. 41,206, 41,217 (Nov. 13, 1986) (emphases added). This interpretation must be read in light of the fact that there are an estimated 2.5 to six billion birds in the United States, two-thirds of which may be described as "migratory." *Solid Waste Ass'n of N. Cook County v. U.S. Army Corps of Engineers*, 191 F.3d 845, 850 (7th Cir. 1999) ("*SWANCC*"), *cert. granted*, 120 S. Ct. 2003 (2000). The "migratory bird interpretation" (sometimes called the "migratory bird *rule*") therefore purports to authorize jurisdiction over any plot or parcel that might possibly serve as landing ground for one of 1.66 to four billion birds. *See id.* at 847.

Commercial activity as such is *not* a focus of the federal wetlands program. Rather, the migratory bird interpretation controls the use of lands that meet the federal definition of "wetlands," regardless of whether or not they are to be used or modified for commercial purposes, or have any discernible connection to commerce. Both on their face and as applied by the Corps and EPA, neither the regulations themselves nor the migratory bird interpretation requires "that the regulated activity have a substantial effect on interstate commerce," or "that the covered waters have any sort of nexus with navigable, or even interstate, waters." *United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997).

Because it lacks any requirement of nexus to economic, interstate, or commercial activity, the Corps' interpretation ineluctably inserts federal regulators into local land-use decisions for virtually every parcel of land in the nation. As the Corps correctly noted in a letter to EPA's Director of Wetlands Protection, "it is very unlikely that there is any waterbody in the United States that would have [other Commerce Clause] connections and not some type of migratory bird usage." Letter from Gen. Peter J. Offringa to Mr. David G. Davis and

accompanying memorandum (Oct. 30, 1987).[2] Few, if any, parcels of land are so misbegotten that they are beyond any actual *or potential* use by these billions of migrating birds. As a result, the logic underpinning the Corps' migratory bird interpretation may be used to justify federal regulation of private land from coast to coast, making the Corps' section 404 program a *de facto* federal land-use law reaching into every corner of the Nation.

B. Under Our System of Government, Land-Use Planning is "the Quintessential" Function of States.

Environmental concerns relating to land usage have long been the province of State and local regulation. The Court has therefore observed that "[t]he regulation of land use is traditionally a function performed by local governments." *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 402 (1979); *see also Hess v. Port Authority Trans-Hudson Corp.*, 513 U.S. 30, 44 (1994) (same); *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994) (recognizing "the authority of state and local governments to engage in land use planning"); *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). The Court has also deemed "zoning laws" and land-use controls as "*peculiarly* within the province of state and local legislative authorities." *Warth v. Seldin*, 422 U.S. 490, 508 n.18 (1975) (emphasis added); *see also United States v. Oregon*, 366 U.S. 643, 649 (1961) (holding that property law, including title, transfer, and inheritance, is "an area normally left to the States"). In fact, the Court has gone so far as to declare that "regulation of land use is perhaps *the* quintessential state activity." *Federal Energy Regulatory Comm'n v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (emphasis added).

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[2] Gen. Offringa's letter and accompanying memorandum appear as part of Exhibit 24 in the Appendix to the *Amici* Brief submitted by Serrano Irrigation District, *et al.*, in support of Petitioner. The documents are more fully discussed in Part III of that brief.

In 1963, nearly a decade before passage of the CWA, Massachusetts enacted the first statewide wetlands protection statute, which required state-issued permits as a precondition to filling or dredging of coastal wetlands. Mass. Gen. Laws ch. 130, § 27A, 1963 Mass. Acts 426, *repealed by* 1972 Mass. Acts 784, § 2, *superceded by* Mass. Gen. Laws ch. 131, § 40 (1991). Massachusetts then extended such protections to inland wetlands two years later—a full decade before the Corps began regulating wetlands in the aftermath of the decision in *Natural Resources Defense Council v. Callaway*. *See* 392 F. Supp. 685, 686 (D.D.C. 1975) (directing that wetlands be regulated under CWA section 404). Moreover, although the Massachusetts law was the first state-level statute, it was far from the first local initiative to protect wetlands. Rather, the Massachusetts law itself was "based on a number of local zoning permit requirements already to be found in coastal states." Alexandra D. Dawson, *Massachusetts' Experience in Regulating Wetlands in Wetland Protection: Strengthening the Role of the States* 255 (Ass'n of State Wetland Managers, 1985).

Nor did Massachusetts act alone. Other States, including Connecticut, Georgia, and Washington, all took active measures toward protecting wetlands in the 1960s. In fact, by the time federal wetlands regulation was initiated by the 1975 *Callaway* decision, every coastal State but one had adopted coastal wetlands protections, and eleven States had passed statutes to protect freshwater wetlands as well. *See* Jon A. Kusler *et al.*, *State Wetland Regulation: Status of Programs and Emerging Trends* 1 (Ass'n of State Wetland Managers, 1994).

States not only have enacted wetlands regulatory requirements that match or exceed those of Section 404, they have also taken the lead in incorporating the latest advances in ecological research into concrete conservation initiatives. Accordingly, "State wetland programs have evolved

considerably over the last thirty years, and most are much more sophisticated than even five years ago." *Id.* at 20.

State wetland protection efforts are diverse, ranging from traditional permitting systems to incentive programs, "critical area" designations, and buffer zone requirements. This regulatory diversity reflects "the [biological] diversity of freshwater wetland types across the nation and state preferences." *Id.* at 12. State efforts are further complemented by wetlands protection measures enacted by thousands of local governments nationwide. *See* Jonathan H. Adler, *Wetlands, Waterfowl and Mr. Wilson: Commerce Clause Jurisprudence and the Limits of Federal Wetland Regulation*, 29 Envtl. L. 1, 48-52 (1999) (summarizing the history of state wetland regulation). State wetlands protections thus confirm Justice Brandeis' observation that "[i]t is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country." *New State Ice Co. v. Liebmann*, 285 U.S. 262,. 311 (1932) (Brandeis, J., dissenting).

These longstanding and fruitful State initiatives are nonetheless threatened by the Clean Water Act's growing displacement of local land-use law. The sole function of the migratory bird interpretation, it should be remembered, is to provide jurisdiction over lands that would otherwise lie beyond federal jurisdiction—isolated wetlands that, *by definition*, have no physical or hydrological connection to other wetlands. Because of that interpretation, State and local agencies that have carefully reviewed likely impacts of proposed land uses often see their decisions vetoed by federal agencies that have not even explained how a proposed use implicates any commercial or interstate interests. The Corps' broad interpretation of Section 404 threatens the State laboratories that have produced the pioneering achievements in wetlands protection.

C. The Migratory Bird Interpretation Unwisely Infringes State Authority.

The *de facto* displacement of local land-use decisions that stems from the Corps' wetlands program is an unwise departure from the genius of our federalist system. As the Court recognized in *Gregory*, the "federalist structure of joint sovereigns preserves to the people numerous advantages." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991). A "decentralized government" will, in particular, "be more sensitive to the diverse needs of a heterogeneous society;" increase opportunities "for citizen involvement in democratic processes;" allow "for more innovation and experimentation in government;" and make "government more responsive by putting States in competition for a mobile citizenry." *Id.* Accordingly, the federal government, "anxious though it may be to vindicate and protect federal rights and federal interests," should "endeavor to do so in ways that will not unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

In this respect, a wise preservation of State and local authority over land-use decisions is closely analogous to a wise defense of the national government against intrusive State regulation of national concerns like the flow of commerce. Interstate commercial activity, as the Framers well knew, is best promoted by minimizing uncertain or duplicative regulatory requirements. *See Missouri Pac. R. Co. v. Stroud*, 267 U.S. 404, 408 (1925) ("It is elementary and well settled that there can be no divided authority over interstate commerce, and that the acts of Congress on that subject are supreme and exclusive."). When an automobile is designed in Japan, built in Ohio, purchased in Maryland, and driven in the District of Columbia, the imposition of local product safety standards, whether through legislatures or the courts, compromises this overriding national interest in the free flow of goods and services. *Cf., e.g., Geier v. American Honda Motor Co.*,120 S. Ct. 1913 (2000). In such circumstances, the only hope for economically efficient regulation is a national rule; hence, wise congressional and sound judicial action in furtherance of such rules furthers the Framers' design. *See id.*

In the area of land-use regulation, the situation is largely reversed: Local land-use planning is not a traditional sphere of national regulation, nor in many cases is it conducive to treatment by national rules. The imposition of federal land-use controls therefore confuses what would otherwise be a tolerably clear allocation of responsibility between the federal government and the States. Here, it is the very imposition of federal rules that creates nonuniformity, subjects parties to duplicative and conflicting requirements, and generates legal uncertainty. Having "split the atom of sovereignty," the Framers determined that "our citizens would have two political capacities, one state and one federal, each protected from incursion by the other." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). But for these dual capacities to be meaningful, they must continue to correspond to a two-tiered system of well allocated governmental responsibilities. That system of allocated responsibilities traditionally and effectively assigns authority over land usage, planning, and zoning largely to the States. This Court should respect that assignment.

II. THE CORPS' MIGRATORY BIRD INTERPRETATION VIOLATES THE COMMERCE CLAUSE.

The Commerce Clause authorizes Congress to regulate the "channels of interstate commerce," the "instrumentalities of interstate commerce or persons and things in interstate commerce" and "those activities having a *substantial relation* to interstate commerce." *United States v. Lopez*, 514 U.S. 549, 558-59 (1995). Specifically, in order to satisfy the third prong of this test—the prong relied on by the Seventh Circuit below—federal regulatory activity must "substantially affect"

commerce. *SWANCC*, 191 F.3d at 849. As demonstrated below, however, the potential presence of birds on wetlands does not even approach the level of commercial effects required under this Court's precedents.

A. The Corps' Migratory Bird Interpretation Unconstitutionally Asserts Regulatory Authority Over Noncommercial Activity.

The Corps' migratory bird interpretation of the Clean Water Act, like § 922(a) of the Gun-Free School Zones Act, "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however broadly one might define those terms." *Lopez*, 514 U.S. at 561. Nor is the rule "an essential part of a larger regulation of *economic* activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." *Id.* (emphasis added). The rule instead focuses on actual or potential landings by migrating birds—activities that neither "arise out of" nor "are connected with a commercial transaction." *Id.; accord United States v. Wilson*, 133 F.3d 251, 257 (4th Cir. 1997) ("The regulation requires neither that the regulated activity have a substantial effect on interstate commerce, nor that the covered waters have any sort of nexus with navigable, or even interstate, waters.").

The Seventh Circuit nevertheless upheld the Corps' regulation, relying upon the cumulative impacts doctrine. *See* 191 F.3d at 850 (noting "the relevant legal question for our case is whether the destruction of the natural habitat of migratory birds *in the aggregate* 'substantially affects' interstate commerce") (emphasis added). The court reasoned that because migratory birds require habitat; and because human activities like hunting and bird-watching relate to birds; and because these activities in turn support commercial endeavors involving tourism and consumer purchases; and because those endeavors—taken in the aggregate—"substantially affect" commerce, *therefore* the *Lopez* test is satisfied. *Id.*

The Seventh Circuit's chain of inference is even more "attenuated," and hence less adequate, than those expressly rejected by this Court in *Lopez* and *United States v. Morrison*, 120 S. Ct. 1740 (2000). The fact that the federal government might be authorized to enact regulations to protect migratory birds does not mean that the federal government may control each and every environment in which migratory birds *might* be found, any more than the government's undoubted authority to regulate transfers, sales and uses of guns authorizes regulation of elementary schools and other places where guns *might* be found.

Moreover, the Seventh Circuit's claim that "habitat" serves as a meaningful jurisdictional limit is also without merit. *See* 191 F.3d at 850. Under the Corps' interpretation, all that 33 C.F.R. § 328.3(a) requires is that an activity "*could* affect" interstate commerce or that lands "are or *would be used* as habitat by birds protected by Migratory Bird Treaties" or "are or *would be used* as habitat by other migratory birds which cross state lines." 51 Fed. Reg. at 41,217 (emphases added). EPA and the Corps have further asserted jurisdiction when "the characteristics of the waterbody would lead *one to expect* it to be used as habitat for *at least part of the life cycle* of migratory birds." U.S. Army Corps of Engineers/Environmental Projection Agency Joint Memorandum on "Clean Water Act Jurisdiction Over Isolated Waters," accompanying letter from Gen. Peter J. Offringa to Mr. David G. Davis (Oct. 30, 1987). As the Corps recognized, "it is very unlikely that there is *any* waterbody in the United States that would have [any other Commerce Clause] connections and not some type of migratory bird usage." Letter from Gen. Peter J. Offringa to Mr. David G. Davis (Oct. 30, 1987) (emphasis added).

To be sure, as the Corps pointed out in *certiorari* briefing, "Petitioner's proposal to construct and operate a municipal solid waste landfill . . . is clearly an economic activity." Opp. 11 n.6. But the Corps itself acknowledged before this litigation

that "[a]n interstate commerce connection must be based on the use or potential use of the waterbody *prior to* the commencement of the activity subject to corps regulatory authority." Corps/EPA Joint Memorandum accompanying Letter from Gen. Peter J. Offringa to Mr. David G. Davis (Oct. 30, 1987) (emphasis added). It is therefore the travel patterns of migratory birds and the activities that the Corps has found that could result in "discharge of dredged material," such as "walking," "bicycling," and "driving a vehicle," that matter for purposes of the Commerce Clause analysis.

The flaw in the Corps' rationale is that it fails to establish "any limitation on federal power" in the area of local land-use regulation, "where States historically have been sovereign." *Lopez*, 514 U.S. at 564. Indeed, the human activity that purportedly confers regulatory jurisdiction on the Corps, in contrast to committing violent acts against women or bringing guns to school, will often be trivial. "Walking, bicycling or driving a vehicle" through a wetland all might suffice because all of these activities could result in "discharge of dredged material." 58 Fed. Reg. at 45,020. But if those trivial activities, coupled with self-propelled travel by migratory birds, are enough to uphold federal regulatory authority, there truly are no limits to the possible federal co-option of State land-use, planning, and zoning law. Here, as in the recent decision in *Jones v. United States*, if the Court were "to adopt the Government's expansive interpretation," then "hardly a [parcel of] land would fall outside the federal statute's domain." 120 S. Ct. 1904, 1911 (2000).

But as *Morrison* reaffirms, while the Court has not yet adopted "a categorical rule against aggregating the effects of any noneconomic activity," it has noted that "thus far in our Nation's history our cases have upheld Commerce Clause regulation of intrastate activity *only where that activity is economic in nature*." 120 S. Ct. at 1751 (emphasis added). The "substantial effects" tests of *Lopez* and *Morrison* thus

forbid the invocation of supposedly cumulative economic impacts of regulation of non-commercial activity in order to establish authority under the Commerce Clause. Such leaps of logic would require courts to "pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States." *Lopez*, 514 U.S. at 567. A substantial-effects analysis of that sort would permit federal regulation of every conceivable human activity, up to and including the "activity" of sleeping. *Cf. Brzonkala v. Virginia Polytechnic Inst.*, 169 F.3d 820, 839 (4th Cir. 1999) (en banc) (noting estimates of the costs relating to insomnia at between $92.5 and $107.5 billion per year), *aff'd sub nom. United States v. Morrison*, 120 S. Ct. 1740 (2000). "*Lopez*'s review of Commerce Clause case law" therefore "demonstrates" that in cases sustaining "federal regulation of intrastate activity based upon the activity's substantial effects on interstate commerce, the activity in question has been some sort of *economic endeavor*." *Morrison*, 120 S. Ct. at 1750 (emphasis added).

Here, however, the regulatory scheme is not specifically focused on *economic* endeavors, and there is "no express jurisdictional element" that might otherwise "limit" the regulation's reach to commercial activities. *Lopez*, 514 U.S. at 562. The cumulative effects doctrine therefore cannot save the Corps' asserted authority from infirmity.

B. Economic Side-Effects from Regulation of Noncommercial Activity Cannot Support Federal Regulation under the Commerce Clause.

Under *Lopez* and *Morrison*, it is the economic nature of the *class of regulated activity*, not some measurable economic fallout from the duplicative and unconstitutional regulation itself, that must provide the basis for regulation under the Commerce Clause. In *Morrison*, for example, no one suggested that the economic impacts of the civil penalties *themselves* might provide the necessary commercial nexus. *See*

120 S. Ct. at 1745; 42 U.S.C. § 13981. Indeed, were it otherwise, Congress could evade the Constitution at will simply by magnifying unconstitutional schemes to the point where they become so misguided as to "substantially" (and destructively) affect the nation's economy. But as the Court made clear in *Morrison*, it is the "economic nature of the regulated activity"—not the economic fallout from the regulatory activity—that plays the critical role in Commerce Clause analysis. *Morrison*, 120 S. Ct. at 1750.

This crucial distinction is apparent in the Court's cases that rightly uphold federal regulation of economic activities, such as mining, *Hodel v. Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264 (1981), and wheat production, *Wickard v. Filburn*, 317 U.S. 111 (1942). The distinction also appears in the Court's decision upholding Congress's power to regulate the taking, possession and sale of birds and other animals in *Andrus v. Allard*, 444 U.S. 51 (1979). The laws at issue in *Andrus* specifically targeted hunting and other activity intrinsically related to the animals' value as items in commerce; hence, those laws involved the regulation (prohibition) of commercial activity.

Here, by contrast, the migratory bird interpretation is not part of a regime aimed at economic activity as such; it instead presupposes migratory bird travel and targets everyday, non-economic activities like "walking," "bicycling," and "driving a vehicle." 58 Fed. Reg. at 45,020. Moreover, the direct economic benefits of gun-free schools and reducing gender-based violence are surely more important to the nation's economic well-being than those of preventing micro-scale "discharges" of "dredged material." Accordingly, if the direct impacts asserted in *Lopez* and *Morrison* are insufficient to allow the federal government to bootstrap regulation of noneconomic activity under the Commerce Clause, the impacts hypothesized here must also be inadequate for that purpose.

III. CONSISTENT WITH THE DOCTRINE OF CONSTITUTIONAL AVOIDANCE, THE ACT SHOULD BE CONSTRUED TO PRECLUDE THE MIGRATORY BIRD INTERPRETATION.

Although the migratory bird interpretation is constitutionally problematic, this Court need not address the constitutional issue it poses. Instead, this Court should follow the "guiding principle" that "where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided," a court's "duty is to adopt the latter." *Jones v. United States*, 120 S. Ct. 1904, 1911 (2000) (interpreting federal statute to avoid Commerce Clause issue) (internal citation and quotation marks omitted). This principle is particularly apposite here, where an agency interpretation, rather than a congressional enactment, is at issue.

This is the first time the Court has considered a Commerce Clause challenge to a federal agency's exercise of its delegated powers. Unlike *Lopez* and *Morrison*, this case presents a challenge to an agency's interpretation of its statutory authority, rather than a direct challenge to Congress' constitutional authority under the Commerce Clause. Specifically, the Petitioner challenges the Army Corps' assertion that its authority to regulate "navigable waters" pursuant to the Clean Water Act, 33 U.S.C. § 1344, encompasses authority to regulate each and every "damp depression" that might serve as a landing ground for migratory birds. *See* Brief for Petitioner. While Congress may be entitled to substantial (though not unlimited) deference in the interpretation of its Commerce Clause authority, the Corps is entitled to no such deference.

It is common ground that the deference that might otherwise be accorded to agencies under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), is inapplicable where, as here, an agency interpretation raises

serious constitutional concerns. The Constitution, and the corollary doctrine of constitutional avoidance, necessarily take precedence over *Chevron*. *See, e.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (holding *Chevron* deference inapplicable under these circumstances); *U.S. West, Inc. v. FCC*, 182 F.3d 1224, 1231 (10th Cir. 1999) ("[I]f we determine that the [agency's rule] presents a serious or grave constitutional question, we will owe the [agency] no deference even if its [regulations] are otherwise reasonable."), *cert. denied sub nom., Competition Policy Inst. v. U.S. West, Inc.*, 120 S. Ct. 2215 (2000); *Williams v. Babbitt*, 115 F.3d 657, 662 (9th Cir. 1997) (declining to grant *Chevron* deference to agency interpretations that raise "grave" constitutional questions), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 528 U.S. 1117 (1998); *Chamber of Commerce v. FEC*, 69 F.3d 600, 605 (D.C. Cir. 1995) (agency "not entitled to *Chevron* deference" where interpretation of law raises "constitutional difficulties"); *JCC, Inc. v. CFTC*, 63 F.3d 1557, 1564 (11th Cir. 1995) (courts should not accord deference on "constitutional matters").

This Court accordingly has not hesitated to give "narrow constructions to statutory delegations [to administrative agencies] that might otherwise be thought to be unconstitutional." *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). "Where an otherwise acceptable construction of a statute would raise serious constitutional problems," the Court, as a matter of course, construes "the statute to avoid such problems." *DeBartolo*, 485 U.S. at 575. The undoubted rules are that "an Act of Congress ought not be construed to violate the Constitution if any other possible construction remains available," *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 500 (1979); and that a statutory construction "that avoids this kind of open-ended grant [of legislative power to an administrative agency] should certainly be favored." *Industrial*

Union Dep't, AFL-CIO v. American Petroleum Inst., 448 U.S. 607, 646 (1980) (plurality opinion).

Here, however, nothing in the Clean Water Act or its legislative history indicates that Congress intended to federalize the traditionally local responsibility of land-use regulation, planning, and zoning. *See* Brief for Petitioner. To the contrary, the Act manifests precisely the opposite intent by endorsing the States' continued, preeminent role in regulating land use:

> It is the policy of Congress to recognize, preserve, and protect the *primary responsibilities and rights of States* . . . to plan the development and use (including restoration, preservation, and enhancement) of land and water resources . . . .

33 U.S.C. § 1251(b) (emphasis added). The Clean Water Act itself thus directs that it not be construed to trump State control over land-use planning.

This Court's reluctance to conclude that Congress authorized regulation raising constitutional concerns is applicable in situations where federalism issues are implicated. In cases of novel federal intrusions into local matters that "would upset the usual constitutional balance of federal and state powers," it is "incumbent upon the federal courts to be certain of Congress' intent." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). This "requirement" assures that Congress "has in fact faced and intended to bring into issue, the critical matters involved in the judicial decision." *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989) (internal quotation omitted), *overruled in other respects, Alden v. Maine*, 527 U.S. 706 (1999). Here, however, far from a plain statement authorizing the Corps' interpretation, Congress said exactly the opposite in section 1251(b), the provision that gives the States—not the Army Corps—the "primary" role in

determining land use. That statement alone compels the invalidation of the migratory bird interpretation.

The improbable nature of the authority asserted by the Corps is nonetheless underscored by other environmental statutes that illuminate the Clean Water Act. "[I]t is well established that a court can, and should, interpret the text of one statute in the light of text of surrounding statutes, even those subsequently enacted." *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 120 S. Ct. 1858, 1870 n.17 (2000). In this way, "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand." *FDA v. Brown & Williamson Tobacco Corp.*, 120 S. Ct. 1291, 1301 (2000). Although the Corps says that its interpretation is necessary to protect the habitats of migratory birds, Congress has enacted *other* statutes to address that very problem. *See, e.g.*, Migratory Bird Treaty Act, 16 U.S.C. § 703 (1994); Eagle Protection Act, 16 U.S.C. § 668 (1994); Endangered Species Act, 16 U.S.C. § 1531 *et seq.* (1994). Those laws accomplish directly what the Corps would have the Clean Water Act target indirectly: protection of migratory birds. Accordingly, even if one were otherwise inclined to accept the Corps' interpretation of the CWA's purposes, it would still strain credulity to think, as the Corps contends, that Congress has given the Department *of Defense* greater say over waterfowl habitats than, say, the Fish and Wildlife Service of the Department of the Interior.

In sum, the Clean Water Act could authorize a migratory bird interpretation only if it contained a clear statement to that effect. *See Gregory*, 501 U.S. at 461. But far from providing such a clear statement, the Act, both on its face and read in light of surrounding statutes, says precisely the opposite—that it is the States that continue to enjoy the "primary responsibility" for land-use decisions. 33 U.S.C. §§ 1251(b), 1344. The Corps therefore erred in interpreting the Act to authorize usurpation of this traditional State responsibility.

CONCLUSION

For the foregoing reasons, the migratory bird interpretation would upset traditional federal-State relations, exceed federal authority under the Commerce Clause, and violate basic rules of construction. The judgment of the court of appeals should accordingly be reversed.

Respectfully submitted,

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